December 9, 2004

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-43 is available for public comments under this procedure. It was requested by counsel, Gregg P. Skall, Esq. on behalf of the Missouri Broadcasters Association.

Proposed Advisory Opinion 2004-43 is scheduled to be on the Commission's agenda for its public meeting of Thursday, December 16, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on December 15, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-43, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 9, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Cheryl A.F. Hemsley
Staff Attorney

Subject: Draft AO 2004-43

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 16, 2004.

Attachment

ADVISORY OPINION 2004-43

Gregg P. Skall, Esq.
Womble, Carlyle, Sandridge & Rice, P.L.L.C.
Seventh Floor **BLUE DRAFT**
1401 Eye Street, N.W.
Washington, D.C. 20005

Dear Mr. Skall:

We are responding to your inquiry on behalf of the Missouri Broadcasters Association ("MBA") regarding whether, under the Federal Election Campaign Act of 1971, as amended (the "Act"), a broadcaster would be making a corporate in-kind contribution by selling advertising time at the Lowest Unit Charge ("LUC")[1] to a candidate who fails to include the required BCRA Statement[2] in one of his advertisements and, therefore, is not "entitled" to the LUC under the Communications Act of 1934, as amended. 47 U.S.C. 315(b).

As long as a broadcaster offers the LUC to all other Federal candidates, including those who did not include the required BCRA Statement, the LUC is a discount offered in the ordinary course of business and is not an in-kind contribution.

Background

The facts of this request are presented in your letter of October 29, 2004, as supplemented by your letter of November 19, 2004.

MBA is a voluntary association of broadcasters who are Federal Communications Commission ("FCC") licensees of radio and television stations throughout Missouri.

[1] The LUC is the lowest advertising rate that a station charges other advertisers for the same class and amount of time for the same period. *See* 47 U.S.C. 315(b)(1) and 47 CFR 73.1942(a)(1).
[2] As discussed in detail below, the Bipartisan Campaign Reform Act of 2002 ("BCRA"), P.L. 107-155, 116 Stat. 81 (March 27, 2002), amended section 315 of the Communications Act of 1934, 47 U.S.C. 315(b), such that a Federal candidate "shall not be entitled" to the LUC if any of his advertisements makes a direct reference to his opponent and fails to contain a statement both identifying the candidate and stating that the candidate has approved the communication (the "BCRA Statement").

Your request was prompted by a letter sent to some of MBA's members by the campaign committee of Nancy Farmer, a 2004 Democratic candidate for the U.S. Senate from Missouri.[3] The Farmer campaign's letter alleges that the MBA members were charging Ms. Farmer's opponent, Senator Christopher Bond, the LUC even though, under the Communications Act, the Senator was no longer *entitled* to such a discount because one of his advertisements did not contain the required BCRA Statement.

As indicated in note 2, *supra*, a Federal candidate must include the required BCRA Statement in advertisements that mention the candidate's opponent. For radio broadcasts, the BCRA Statement must consist of a personal audio statement by the candidate identifying himself, the office sought and stating his approval of the message. In the case of television advertisements, for a period of no less than four seconds at the end of the ad, there must appear simultaneously (i) a clearly identifiable photographic or similar image of the candidate; and (ii) a clearly readable printed statement, identifying the candidate and stating that he has approved the broadcast and that his authorized committee paid for the broadcast.

Although the Communications Act generally requires broadcasters to charge candidates the LUC for a candidate's political advertisements in the 45 days preceding a primary election and the 60 days preceding a general election, BCRA amended 315(b) of the Communications Act to provide that a Federal candidate "shall not be *entitled*" [emphasis added] to receive the LUC if any of his advertisements have failed to include the required BCRA Statement. 47 U.S.C. 315(b). Specifically, once a broadcaster airs a Federal candidate's political advertisement that does not contain the BCRA Statement,

[3] A copy of one of the letters sent by the Farmer campaign to an MBA member was attached to your request.

that candidate is no longer guaranteed the LUC for any advertisement aired in the remaining days leading up to the election.

In order to respond to your inquiry, we must address two preliminary issues. First, we must address whether Senator Bond had lost his entitlement to the LUC advertising rate. While we have neither the jurisdiction nor the facts necessary to determine whether one of Senator Bond's advertisements in fact failed to contain the required BCRA Statement, your request is premised upon such an assumption. You state that some MBA members "charged Senator Bond the [LUC] for campaign advertisements *after he lost his entitlement*" [emphasis added] to receive such a discount. Accordingly, we assume, for the purposes of this opinion, that Senator Bond ran an advertisement without the required BCRA Statement and therefore was not entitled to the LUC, but we make no independent judgment as to this issue.

Second, we must address whether your statement of the Communications Act is correct as to whether it is permissible for a broadcaster to continue to offer the LUC to a candidate who is no longer "entitled" to it. As you acknowledge, the FCC is the agency with jurisdiction to interpret the Communications Act. Although the FCC has not yet promulgated regulations implementing the BCRA amendments to the Communications Act, you argue that despite a candidate's lack of entitlement to the LUC, under section 315(b)(1) of the Communications Act, a broadcaster is still permitted to *offer* the LUC discount to such a candidate.[4] You argue, therefore, that the lack of entitlement does not create a requirement for a broadcaster to charge a rate higher than the LUC to such an

[4] Informal conversations between Federal Election Commission ("FEC") and FCC staff members confirm that the FCC staff interprets the BCRA amendments to the Communications Act to allow a station to offer the LUC to a candidate who has failed to include the BCRA Statement in one of his advertisements, as long as it treats all Federal candidates in a consistent, non-discriminatory manner.

"unentitled" candidate. As this issue is within the jurisdiction of the FCC rather than the FEC, for purposes of this opinion, we presume that your statement is correct, and make no independent judgment as to that issue.

Question Presented

Does a broadcaster make an in-kind contribution by charging a Federal candidate the LUC for advertising time when the candidate is not "entitled" to the LUC under the Communications Act? If the LUC is an in-kind contribution, must the broadcaster re-bill the candidate for the difference between the LUC and some higher rate?

Legal Analysis and Conclusions

The Act prohibits any corporation from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a). The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or anything of value for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and 431(9)(A)(i); 11 CFR 100.52(a) and 100.111(a); *see also* 2 U.S.C. 441b(b)(2) and 11 CFR 114.1(a)(1) (providing a similar definition for "contribution and expenditure" with respect to corporate activity). Commission regulations further define "anything of value" to include all in-kind contributions and state that, unless specifically exempted under 11 CFR 100.71(a), the provision of any goods or services (including advertising services) without charge, or at a charge which is less than the usual and normal charge for such goods or services, is a contribution. 11 CFR 100.52(d)(1); *see also* 11 CFR 100.111(e)(1).

The Commission has held, however, that discounts that are less than the usual and normal charge are not contributions if such discounts are offered in the ordinary course of

business. *See, e.g.*, Advisory Opinions 2004-18, 1996-2, and 1989-14. Since the LUC is a statutorily-guaranteed discount available to all candidates whose advertisements contain the required BCRA Statement, it is a discount offered in the ordinary course of business to those candidates. Additionally, because the LUC itself is calculated based on the rates available to certain commercial advertisers,[5] it is by definition, offered to *some* customers in the ordinary course of business. Accordingly, because a broadcaster must offer the LUC to all candidates whose advertisements contain the required BCRA Statement and because certain commercial advertisers also receive a discount amounting to the LUC, the Commission concludes that a broadcaster may offer the LUC to a Federal candidate whose advertisement did not include the required BCRA Statement without making an in-kind contribution, so long as the broadcaster provides the LUC to all similarly situated Federal candidates, thereby ensuring that the discount does not favor any particular candidate.

Therefore, based on your representation that no MBA member who offered the LUC to Senator Bond failed to make the LUC available to any other Federal candidate, whether or not the candidate was "entitled" to the LUC, the offer of the LUC to Senator Bond did not constitute a prohibited in-kind contribution. Finally, because we have concluded no in-kind contribution was made, we do not need to reach your question regarding re-billing.

The Commission expresses no opinion regarding the applicability of the Communications Act of 1934, or of regulations promulgated by the FCC, to the activities in this request because those questions are outside the Commission's jurisdiction.

[5] *See* note 1, *supra*.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. We emphasize that if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Bradley A. Smith
Chairman

Enclosures (AOs 2004-18, 1996-2, and 1989-14)